Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

AUGUSTUS J. SIMMONS,

Petitioner,

v.

DAVID R. HINSON, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

AUGUSTUS J. SIMMONS,
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QUESTION PRESENTED

Whether the arbitrary, fraudulent, and unconstitutional seizure of airport federal project real property, without any court proceedings, without necessary parties, without payment of compensation, without compliance with mandatory federal regulations 42 U.S.C. §§ 4628, 4655, is in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and, inasmuch as no action has been commenced or is pending in any state or federal court in respect of this matter, it follows that the jurisdiction of the court has never been invoked and that the extrajudicial seizure entered on the public Land Records of the Town of East Granby, Connecticut on June 2, and June 5, 1978, is and always was, wholly void.

LISTING OF PARTIES

Petitioner:

Augustus J. Simmons, Landowner

Respondents:

David R. Hinson, Administrator Federal Aviation Administration

Lt. Gen. Henry J. Hatch, Chief Engineer United States Army Corps of Engineers

J. William Burns, Commissioner (replacing Emil H. Frankel) Connecticut Department of Transportation

Janet P. Reno, Attorney General United States Department of Justice

Col. John J. Collins, Administrator Connecticut Air National Guard

Drew S. Days, Solicitor General United States Department of Justice

Richard Blumenthal, Attorney General State of Connecticut

John J. Bartizek, District Clerk Metropolitan District Commission

Edward J. Rogin, Sr., Esq. CityPlace, Hartford, CT

Robert Hirtle, Jr. Esq. CityPlace, Hartford, CT

William A. Collier, Esq. United States Attorney's Office (Hartford, CT)

Bourke G. Spellacy, Esq. (Metropolitan District Commission) Hartford, CT

There is no parent or subsidiary company to be listed.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LISTING OF PARTIES AND STATEMENT UNDER SUPREME COURT RULE 17.1 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 15

1. The opinion below reflects a widespread conflict with other jurisdictions, the United States Constitution, and this Court in the arbitrary and fraudulent confiscation of federal project airport property without notice, without jurisdiction, and without statutory authority 15

2. The opinion below reflects a significant and continuing problem with the unconstitutional backdating the confiscation to November 12, 1964 to avoid compliance with congressionally mandated federal regulations and procedures and concealment of fraudulent leases entered into between the federal agency, F.A.A., and the Connecticut Department of Transportation 17

TABLE OF CONTENTS – Continued

Page

3. The petition for the annulment of the extrajudicial judgments was filed upon the ground that the plaintiff (owner) was never served with process or made a party to any action before a court of competent jurisdiction, prior to, during, or after the confiscation..... 20

4. The petition for the annulment of the extrajudicial judgments was filed upon the ground that – the action of the government (Federal Aviation Administration, United States Army Corps of Engineers) has been such as to impose a servitude upon the property which interferes with the use, management, or enjoyment of the same – without compensation..... 21

5. The petition for the annulment of the extrajudicial judgments was filed upon the ground that the action, or INACTION of the Connecticut Department of Transportation has been a medley of continuing official acts constituting interference with the owner's use and enjoyment of his property dating back to November 12, 1964 – without just compensation, without due process 23

THE DECISION BELOW IS INCORRECT..... 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES CITED:

Abdo Ahmed Nagi v United States, 751 F.2d 826 25

Armstrong v Manzo, 380 U.S. 545 15

Baldwin v Hale, I Wall 223 15

Beaird-Poulan, Inc. v Louisiana Dept. of Highway's, 487 F.2d 54 18

Belt v Texas, 175 S.W. 2d 622 21

Brandiff v Sellas, 40 C. Sup. 243, 488 A 853 20

Brill v Ulrey, 159 Conn. 371, 269 A 262 23

Calvert Cliffs Coord. Comm. v U.S. A.E. Comm., 449 F.2d 1109 18

Case v Bush, 93 Conn. 550, 106 A 822 24

City of Atlanta v United States, 531 F. Supp. 506 8

City of Columbia, S.C. v Costle, 710 F.2d 1009 (1983) ... 18

Colorado River Water Cons. Dist. v United States, 424 U.S. 800 21

Comprehensive Merchandising Catalogs Inc. v Madison Sales Corp., 521 F.2d 1210 20

Grannis v Ordean, 234 U.S. 385 15

Griggs v Allegheny County, 369 U.S. 84 22

Harvey v Elliot, 167 U.S. 409 15

Hughes v Washington, 389 U.S. 290 19

Jepsen v Toni Co., 20 Conn. Supp. 294 20

Kawasaki, Kissen, Kaisha, Ltd. v Indomar, Ltd., 173 Conn. 269, 377 A2d 316 23

TABLE OF AUTHORITIES – Continued

Page

Lake Carriers Assn. v MacMullen, 406 U.S. 498 25

Lilly v Claypool, 53 S.E. 22, 59 W.Va. 130 24

Lynch v Household Fin. Co., 405 U.S. 538 25

Morici v Jarvie, 137 Conn. 97, 75 A 47 23

New Haven Sandblast Co. v Dreisbach, 104 Conn. 222, 133 A 99 ..... 23, 24

Noble v Union River Logging R.R., 147 U.S. 165 24

Pennsylvania Coal Co. v Mahon, 260 U.S. 393 22

Samson v Bergin, 138 Conn. 306 20

Shaw v Spelke, 110 Conn. 208, 147 A2d 675 23

Shelton v Wolthauser, 80 Conn. 599 12

Simmons v State of Conn., 160 Conn. 492 13

Simmons v Wetherell, #163875 ..... 7, 12, 13, 24, 25

Standard Oil Co. v Missouri, 32 S.Ct. 409 16

Steinmetz v Steinmetz, 125 Conn. 663 23

United States v Causby, 328 U.S. 256 22

United States v New Haven, 447 F.2d 972 6

Windsor v McVeigh, 93 U.S. 274 ..... 15, 16

Witman v Missouri St. Hwy. Comm., 460 F. Supp. 1050 18

STATUTES:

~~14~~ C.F.R. § 152.1 8

14 C.F.R. § 152.3 18

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 4628 ..... 4, 8, 19

42 U.S.C. § 4651-4655 ..... 7, 18, 25

42 U.S.C. § 4655 ..... 2, 3, 7, 17, 18

49 C.F.R. § 24.102 16

49 U.S.C. § 1301 6

49 U.S.C. § 1348(b) and (d) 6

49 U.S.C. § 1508a 6

Conn. Gen. Statute 13b-50(d) 7

Conn. Gen. Statute 48-17a, b, c 7

Conn. Gen. Statute 48-21 16

Administrative Proc. Act. § 5 U.S.C. 701 et seq. 4, 8

LEGISLATIVE MATERIALS:

H.R. Rep. No. 91-646, 91st Cong. 2d Sess. (1970), reprinted at 1970 U.S. Code Cong. & Ad. News 5853 17

Public Law 91-646 ..... 2, 17

Public Law 100-17 ..... 3, 17

F.R.C.P. 60(b) 20

Black on Judgments (2d Ed.) Vol. 1 § 215 23

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Augustus J. Simmons, respectfully prays that a writ of certiorari issue to review the denial of rehearing of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 7, 1995.

OPINION BELOW

The District Court judgment dismissing the complaint dated May 27, 1994 is printed at Appendix C, infra, and the order of the United States Court of Appeals for the Second Circuit, dated December 21, 1994, is printed at

Appendix B, infra, and the petition for rehearing is printed at Appendix A, infra, and is not officially reported.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Second Circuit was entered on February 7, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254 and under Rule 17.1 of the United States Supreme Court Rules.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 4655 (Public Law 91-646 – January 2, 1971)

Requirements for uniform land acquisition policies; payments of expenses incidental to transfer of real property to State; payment of litigation expenses in certain cases.

Notwithstanding any other law, the head of a federal agency shall not approve any program or project which will result in the acquisition of real property on and after the effective date of this title, unless he receives satisfactory assurances from such state agency that –

(1) In acquiring real property it will be guided, to the greatest extent practicable under state law, by the land acquisition policies in Section 301 and the provisions of Section 302, and

(2) Property owners will be paid or reimbursed for necessary expenses as specified in Sections 303 and 304.

AMENDMENT OF SECTION § 4655

Pub. L. 100-17, Title IV §§ 417, 418, Apr. 2, 1987, 101 Stat. 256, provided that, to take effect on the effective date provided in regulations promulgated under Section 4633 of this title (as amended by Section 412 of Pub. L. 100-17, but not later than two years after Apr. 2, 1987, this section is amended by designating existing provisions as Subsec. (a), in Subsec. (a) as so designated striking out "a state agency" the first place it appears and inserting in lieu thereof "an acquiring agency" and striking out "state agency" the second place it appears and inserting in lieu thereof "acquiring agency," and by adding at the end thereof the following new subsec. (b):

"(b) for purposes of this section, the 'acquiring agency' means –

"(1) a state agency (as defined in Section 4601(3) of this title, which has the authority to acquire property by eminent domain under state law, and

"(2) a state agency or person which does not have such authority, to the extent provided by the head of the lead agency by regulation."

AMENDMENT V, CONSTITUTION OF THE UNITED STATES

" . . . nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES

" . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE ADMINISTRATIVE PROCEDURES ACT 5 U.S.C. § 701 et seq.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States; provided, that any mandatory or injunctive decree shall specify the federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief in any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

42 U.S.C. § 4628 (Public Law 91-646 – January 2, 1971)

STATE ACTING AS AGENT FOR FEDERAL PROGRAM

Whenever real property is acquired by a state agency at the request of a federal agency for a federal program or project, such acquisition shall, for the purposes of this act, be deemed an acquisition by this federal agency having authority over such program or project.

STATEMENT OF THE CASE

On December 15, 1960, petitioner Augustus J. Simmons was in receipt of a letter from the Department of Aeronautics of the State of Connecticut wherein the State, in conjunction with the federal government, entered into an agreement in 1955 for the acquisition of land for "doolittle clear zones" of both ends of Runway 6-24 at Bradley International Airport located in northern Connecticut. A portion of petitioner's land is located in the doolittle clear zone and was, starting in 1962, invaded and appropriated by the federal agency, Federal Aviation Administration (F.A.A.), with the erection of permanent navigational instrumentation on the surface of the property to control air traffic in and around the navigable airspace of the airport.

Starting with February 28, 1962, service was made upon Anastasia Simmons, mother and predecessor in title, of a condemnation of certain real property to be used for federal instrumentation, without compensation or deposit with the court. In retrospect, even though the procedures used by the state agency were, in due course, ruled illegal, null and void, it served the purpose and the means by which the federal agency (F.A.A.) was able to

engage in "major federal action" with the installation of permanent instrument landing system lights and thus begin the servitude imposed upon the landowner, without compensation – up to the present date.

The exclusive responsibility for air-navigation facilities and the surface upon which they were mounted is that of the federal agency (F.A.A.) under the authority granted under 49 U.S.C. § 1348 (b) and (d).

It has been the position of the United States that the clear zones, referenced in first paragraph as "doolittle clear zones," embrace navigable airspace which are within the sole jurisdiction of the federal government. Under the Federal Aviation Act of 1958 (49 U.S.C. § 1301 et seq. as amended) the United States has asserted that it possesses and exercises "complete and exclusive national sovereignty in the airspace of the United States." 49 U.S.C. § 1508a. *See United States v New Haven*, 447 F.2d 972.

A second attempt at condemnation by the state agency in 1968 under statutes that were totally irrelevant to taking of property for airport purposes was also declared null and void in March, 1971. (160 Conn. 492). By judgment dated April 16, 1971 and recorded on the Land Records March 24, 1972 at Vol. 52, p. 242-243 of East Granby, Connecticut Land Records, all previously condemned properties of petitioner reverted, passed to and vested back to the owner – and again the owner was required to pay property taxes while the uninterrupted servitude by the F.A.A. continued unabated.

Almost simultaneously with the March, 1971 decision of the State Supreme Court referenced above was the

enactment by the United States Congress in January, 1971 of the Uniform Real Property Acquisition Act, Title III (42 U.S.C. §§ 4651-4655). The effective date of this Congressionally mandated legislation was to be no later than July 1, 1972 after which section 305 (42 U.S.C. § 4655) shall be completely applicable to all states with the land acquisition procedures specified in § 4651 establishing uniform and equitable land acquisition policies for federal and federally assisted programs. Also, Connecticut General Statute 13b-50(d) clearly states all acquisitions financed wholly or partly with federal monies are to be done in the manner prescribed by the federal authorities, acting under the laws of the United States, and any rules or regulations made thereunder, notwithstanding any other state law to the contrary. Thus, after July 1, 1972, it was implicit and mandatory that all acquisitions for airport purposes were to proceed under federal regulations and federal – not state – law.

Prior to the enactment of the Uniform Acquisition Act petitioner was instrumental in getting a special act passed by the Connecticut General Assembly to sue the state for damages over "loss of use of land" arising out of the bumbling condemnation proceedings. On January 5, 1970, petitioner Simmons brought such a suit, docket no. 163875 (*Simmons v Wetherell*). The Connecticut Department of Transportation, in order to be in compliance with the mandates of the Uniform Real Property Acquisition Act were instrumental in having the Connecticut General Assembly enact legislation (C.G.S. 48-17a, b, c) that corresponds to the special act of the petitioner. Since neither

the state nor the federal agency have acquired a "satisfactory property interest" as defined in (14 C.F.R. 152.1), no damages have been resolved.

The servitude by the federal agency, F.A.A., against the landowner after the aborted second condemnation of 1971 resulted in the federal agency entering into private leasehold interests with the Connecticut Department of Transportation without payment of compensation to the state agency or the owner, without any recording on the Land Records, notwithstanding that 42 U.S.C. § 4628 of the Uniform Acquisition Act controls: "whenever real property is acquired by a state agency at the request of a federal agency for a federal program or project, such acquisition shall, for the purposes of this act, be deemed an acquisition by the federal agency having authority over such program or project."

The fact that the federal government possesses exclusive jurisdiction over the airspace and possesses illegal and fraudulent leasehold interests to the real property upon which its navigational instrumentation is located makes the United States an indispensable party to the litigation and subject to review action as permitted by 5 U.S.C. 701 et seq. and the upholding of the dismissal by the Second Circuit Court of Appeals is in direct conflict with *City of Atlanta v United States,* 531 F. Supp 506.

The public policy of the Connecticut Department of Transportation for real property acquisition process for transportation projects was submitted to petitioner by James Lewis, Director, Office of Rights of Way, and reads: "Title search activities are normally completed during the preliminary engineering phase of a project to ascertain

ownership of the land to be acquired. The rights of way phase of the project normally begins with the preparation of appraisals on all property to be acquired. This is followed by negotiations with affected owners, acquisition of title via a deed or condemnation, and relocation of displaced individuals prior to construction of the project."

Two executory contract meetings were held for the sale of land, the first on December 13, 1977 and the second on January 4, 1978 without any appraisals being submitted or any reference to damages and each was repudiated, disaffirmed within twenty-four hours for reasons of fraud, duress, lack of appraisals, concealment of leasehold interests granted by the sponsor to the federal agency of the subject property, failure to make the federal agency a party to the action, and, failure after two botched condemnations to make an assessment of damages – prior to the acquisition of title. The INTENT was obvious to circumvent the public policy of regulations and guidelines mandated by the Uniform Act and the policy and guideline of the Connecticut Department of Transportation – as submitted to petitioner. After the first executory meeting of December 13, 1977, petitioner requested withdrawal of counsel on December 22 and 23, both verbally and by memorandum and appeared on January 4, 1978 with new counsel, but, new counsel was not permitted to represent petitioner.

Notwithstanding the repudiation and disaffirmance the second time via a certified letter and in person, a "closing" was still scheduled for April 19, 1978 with a court reporter present and a witness for petitioner, not

realizing a reporter would be present. A portion of proceedings held on April 19, 1978 at offices of Rogin, Nassau, Caplan, Lassman and Hirtle with court reporter William G. Crampton reads:

Mr. Hirtle: Mr. Simmons, as I understand it, you don't want to proceed further with the closing, is that correct?

Mr. Simmons: Bob Hirtle, I have the highest respect for you. Just like I sent you the letter, I have the highest and utmost respect for Referee Shapiro and I further qualified it by saying that I am not going to be a party to any deal which is going to be coming out and being made public whereby the Rogin firm and my good friends here, David Salzman and Steve, who I have been very prone to pick on. It is just not fair to everybody to have this kind of an arrangement and I am not going to be a party to it. What the State is attempting to do here is to say okay, let's date this thing back so their skirts are clean. They want me to go back and do battle with the Town over taxes and I say bullshit to that. We are going to clear that matter up before there will be any goddamned closing. We are going to get that cleared up and they are going to be open and above board. Hell, it is everybody and I'm telling you, everyone at the table, everything is going to be above board and no dealing is going back to November of '64.

Mr. Hirtle: You will not sign a deed today to consummate the closing, is that what I understand?

Mr. Simmons: Because the agreement states and I have to say if any portion of it is a nullity then it is all a

nullity and I am not going to be a party to anything that is a nullity.

Mr. Neusner: Is that a definite negative answer?

Mr. Hirtle: You are instructing counsel not to proceed with the closing because you consider it to be a nullity?

Mr. Simmons: I am going to answer you, Bob, by saying that I sent you a certified letter expressing my position and when I talked to you on the phone, I said to myself, at least I am going to give them the courtesy of putting in an appearance today. I think that is a sufficient answer.

Mr. Hirtle: So I am not to proceed to closing and you will not sign the deeds today?

Mr. Simmons: That is correct.

Mr. Hirtle: And the meeting is adjourned.

(Whereupon at 11:44 a.m. the closing was adjourned.)

Appearances: Augustus (Ozzie) Simmons, John Kataja, witness; David Salzman, Esq.; Stephen Silverman, Esq.; Dennis Ceneviva, Esq.; Robert L. Hirtle, Esq.; present also was Edward Rogin, Sr., Esq. but not listed.

On April 20, 1978, twenty-four (24) hours after plaintiff's refusal to tender any deeds, plaintiff was served with a *NOTICE OF WITHDRAWAL* by all counsel and the local sheriff served plaintiff with a P.J.R. (pre-judgment remedy – without hearing) attaching plaintiff's airport property to the sum of $105,000.00 for counsel fees – in lieu of a service of process for real property acquisition,

notwithstanding the written representation was on a contingency basis, and, the same day the P.J.R. was filed on the Land Records of the Town of East Granby, Connecticut, at Vol. 59, p. 419.

Without initiating any eminent domain proceedings, having submitted a withdrawal, transcending power from plaintiff's tort action (*Simmons v Wetherell*, #163875), an unconstitutional seizure is filed upon the Land Records by Attorneys Rogin-Hirtle on June 2, 1978 at Vol. 59, p. 623, 626 (Ex. #1) – without a court stamp.

Another unconstitutional seizure is filed upon the Land Records on June 5, 1978 at Vol. 59, p. 657 (Ex. #1) – this time with a *FABRICATED* court stamp that contains a citation at Vol. 59, p. 661 (Ex. #1) returnable the first Tuesday of July, 1978 – that is *NOT* going to permit the owner, Augustus J. Simmons to be heard by any court of competent jurisdiction by *NOT* making him a party to the transposed tort action.

Superior Court records show a memorandum dated August 30, 1979 from Jason Pearl, Esq., representing Rogin-Hirtle questioning why after initially granting a motion for payment from the "slush fund," Superior Court Judge John Daly changed course due to a submission to the Judge by Chief Clerk Lucian Jachomovitz that, in spite of submitting some cash to the clerk, a fund that had no relationship whatsoever to the market value or damages, the clerk could not make any disbursements – *"WITHOUT ANY PROCEEDINGS HAD IN OR RELATING TO THAT CASE OR CAUSE"* submitting *Shelton v Wolthauser*, 80 Conn. 599 in support. PAYMENT DENIED.

On May 13, 1980, the Connecticut Supreme Court with "NU-TIEL RECORD" before the court, no return of service ever made to the court, without notice to necessary parties, renders a decision under/over plaintiff's tort action (*Simmons v Wetherell*, #163875) 180 Conn. 587, in direct conflict with a previous decision *Simmons v State of Conn.*, 160 Conn. 492, wherein the Connecticut Supreme Court made very clear at page 500 – *"The authority to condemn is to be strictly construed in favor of the owner and against the condemnor, and the prescribed method of taking must be strictly pursued."* (Citations omitted.)

On September 22, 1980, by judge shopping, Judge Sabino Tamburro granted counsel fees to Attorneys Rogin-Hirtle of $95,600.00 plus interest of $18,014.49 for a total of $113,614.49. Other court disbursements in substantial amounts were also made to Jerome Diamond, a lienholder, and the Town of East Granby for taxes, in spite of fraudulent backdating. Taxes are not paid on state-owned property.

On July 7, 1982 lienholders Valente and Allaire with exclusive liens on Parcel "C" upon which federal instrumentation is located, had applied to the court for satisfaction of the liens from what funds remained and are *DENIED*, by Superior Court Judge Dupont, A., notwithstanding *Simmons v Wetherell*, supra, May 13, 1980.

The Superior Court was specifically challenged on June 7, 1982 by Victor Feingold, Esq., Assistant Attorney General for State of Connecticut with the lack of authority to make any further payments with the following excerpt from transcript of June 7, 1982 at page 17:

> "I now direct Your Honor and invite Your Honor's attention to another element of jurisdiction in the entire matter of Simmons against Wetherell. I might say that whenever I call Your Honor's attention to the question of jurisdiction, in accordance with the law of the state, if lack of jurisdiction is brought to Your Honor's attention, I mean subject matter jurisdiction, no matter in what form or in what way, Your Honor cannot proceed on any of the proceedings until you resolve the issue of subject matter jurisdiction."

It follows that if the Superior Court was without jurisdiction of the subject matter in 1982 or of the parties in 1982, certainly the Supreme Court of Connecticut was in gross error in 1980 with no pleadings, docket number, return of service to the court upon a matter that the courts have previously determined, must be pursued under federal laws and regulations.

Now, February 1, 1991 approaches and, with no compensation paid the owner or necessary parties and the court without jurisdiction to resolve compensation, and a record fourteen (14) encumbrances against the owner (liens, judgments, mortgages), the Army Corps of Engineers, in concert with the Air National Guard and the Connecticut Department of Transportation, *INVADE* AND *APPROPRIATE* Parcel "A" and fence off approximately two (2) acres without notice or compensation. *WHY NOT*!! The F.A.A. did thirty (30) years ago, never paid a nickel and Judge Cabranes in Federal Court not only dismisses several court challenges by the owner on a theory of "res judicata" and fines the owner for vexatious lawsuits while the owner is paying high interest rates on

borrowed money – to subsidize the F.A.A. to fly the planes in and out of Bradley International Airport.

The posture and circumstances of this thirty (30) year extravaganza mandates the impeachment of the extra-judicial judgment seizure.

REASONS FOR GRANTING THE WRIT

1. **The opinion below reflects a widespread conflict with other jurisdictions, the United States Constitution, and this Court in the arbitrary and fraudulent confiscation of federal project airport property without notice, without jurisdiction, and without statutory authority.**

For more than a century the central meaning of procedural due process had been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v Hale*, 1 Wall 223, 233; *Windsor v McVeigh*, 93 U.S. 274; *Harvey v Elliot*, 167 U.S. 409; *Grannis v Ordean*, 234 U.S. 385. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v Manzo*, 380 U.S. 545, 552.

Where there is no legal or valid record before the Superior Courts of Connecticut upon which a recovery can be had, BUT, the private law firm of Rogin-Hirtle, in concert with state and federal officials, having filed an appearance in plaintiff's tort action (*Simmons v Wetherell*, #163875), transcend the limits of its authority by anointing themselves with "SUPER POWER" to set judgments

aside (#162923, 1/11/77), withdraw active federal court actions (2) without plaintiff's permission (H-74-148, 472 F.2d 509 remand), backdate a taking to November 12, 1964 to avoid mandatory federal legislation, order the Connecticut Department of Transportation Rights of Way Division to file highway taking maps on the public Land Records without notice or compensation, disregard the securing of appraisals (49 C.F.R. § 24.102) to establish fair market value, attach plaintiff's property for legal fees of $105,000.00 on April 20, 1978 for failure to give a deed, then, on June 2 and June 5, 1978 put a confiscation on the Land Records without initiating or commencing any proceedings before the court, and, couldn't or wouldn't be bothered to have the sheriff serve necessary parties in a citation and never serve them with process or make a return of service to the court.

Next, a bag of cash is submitted to the Clerk of the Superior Court, no written statements, as required by 49 C.F.R. § 24.102, no eminent domain proceedings were commenced accompanying the cash which gets completely depleted over the years through judge-shopping, gimmickry, and the owner has not, cannot be paid because of C.G.S. 48-21 (lienholders) who have never been notified or served with process, which liens must be satisfied first. The cash bag was estimated at approximately ten (10) percent of fair market value and damages.

From *Windsor v McVeigh*, 93 U.S. 274, 282 and *Standard Oil Co. v Missouri*, 32 Supreme Court at page 409, the court (and that includes superpower bandits Rogin-Hirtle) "must act judicially in all things, and cannot then transcend the power conferred by law." "If the action be

for libel or personal tort, the court cannot order in the case a specific performance of a contract."

Under neither the original 42 U.S.C. § 4655 nor the amendment of the Section, Pub. L. 100-17, Title IV §§ 417, 418, Apr. 2, 1987, 101 Stat. 256 would private counsel Rogin-Hirtle possess statutory authority to act in such confiscatory manner. The unsavory act preceded the amendment and the original Section was controlling in 1978.

The Fifth and Fourteenth Amendments are very clear, unambiguous – too plain for argument – that, to take private property for public use – by force: SERVICE MUST BE MADE UPON THE OWNER, NECESSARY PARTIES, AND COMPENSATION PAID.

2. The opinion below reflects a significant and continuing problem with the unconstitutional backdating the confiscation to November 12, 1964 to avoid compliance with congressionally mandated federal regulations and procedures and concealment of fraudulent leases entered into between the federal agency, F.A.A., and the Connecticut Department of Transportation.

The legislative history of the Act (P.L. 91-646) Titles II and III states that "[i]t is immaterial whether . . . federal funds contribute to the cost of the real property. The controlling point is that the real property must be acquired for a federal or federal financially assisted program or project." H.R. Rep. No. 91-646, 91st Cong. 2d Sess. (1970), reprinted at 1970 U.S. Code Cong. & Ad. News 5853 (giving as an example a state's acquisition of

rights-of-way, for a federal-aid highway, with nonfederal funds).

It is undisputed in the present case that the unlawful and fraudulent confiscation is a necessary incident to acquire a "satisfactory property interest" as defined in federal regulations 14 C.F.R. § 152.3 (definitions) for airport navigational instrumentation installed, maintained, and utilized exclusively by F.A.A. on the subject property to control air traffic in, on, and around Connecticut's premier airport, Bradley International Airport, – no later than November 12, 1964.

The precise language of 42 U.S.C. § 4655, of the Act, indicates that a state must be guided, "to the greatest extent practicable under state law," by the § 4651 procedures. Other jurisdictions have ruled that "greatest extent practicable" meant that Congress intended to have the grant recipient comply with the § 4651 procedures to the fullest extent to which it is legally capable of complying under state law. *Beaird-Poulan Inc. v Louisiana Dept. of Highways*, 497 F.2d 54, 58 (5 Cir), cert. denied, 420 U.S. 990, 95 S. Ct. 1424, 43 L.Ed 2d 670 (1974); *Witman v Missouri State Hwy. Comm.*, 400 F. Supp. 1050, 1066-68 (W.D. Mo. 1975); *City of Columbia, S.C. v Costle*, 710 F.2d 1009 (1983).

In *Calvert Cliff's Coord. Com. v United States A. E. Com.*, 449 F.2d 1109 (1971) the court at page 1114 ruled that the phrase "to the fullest extent possible" does not provide an escape hatch for footdragging agencies, it does not make procedural requirements somehow "discretionary." Indeed, the requirement sets a high standard for the

agencies, a standard which must be rigorously enforced by the reviewing courts.

Where there were three (3) Supreme Court decisions on the subject property: 153 Conn. 351; 155 Conn. 502; 160 Conn. 492 (1971), a remand by the Second Circuit (472 F.2d 509 (1973)), a statement by the owner on April 19, 1978 that there will be no goddamned closing with a dating back to November 12, 1964, nevertheless, the unconstitutional confiscation, OVERRIDES the Connecticut Supreme Court, the Second Circuit Court of Appeals with a dating back to November 12, 1964. The Fourteenth Amendment forbids such confiscation by a state, no less through its courts, than through its legislature, and no less when a taking is unintended than when it is deliberate. *Hughes v Washington*, 389 U.S. 290, p. 298.

The executing of LEASES by the Federal Aviation Administration with the Connecticut Department of Transportation of the subject property, without notice or compensation to the owner is a *CONTINUING VIOLATION* of the Fifth Amendment and a deliberate, devious, unconstitutional procedure to avoid the primary responsibility for acquisition under 42 U.S.C. § 4628 of the Uniform Act which reads: "Whenever real property is acquired by a state agency at the request of a federal agency for a federal program or project, such acquisition shall, for the purposes of the Act be deemed an acquisition by the federal agency having authority over such program or project."

3. The petition for the annulment of the extrajudicial judgments was filed upon the ground that the plaintiff (owner) was never served with process or made a party to any action before a court of competent jurisdiction, prior to, during, or after the confiscation.

The judgment of a court without jurisdiction is a nullity. Such a judgment, whenever and wherever declared upon as a source of a right, may always be challenged. This does not offend the full faith and credit clause of the Federal Constitution, nor does it violate the principles of comity. *Samson v Bergin,* 138 Conn. 306.

Contention that a State Court Judgment is void may be asserted in any proceeding where the validity of the judgment is put in issue. Fed. Rules Civ. Proc. Rule 60(b) 28 USCA, *Comprehensive Merchandising Catalogs, Inc. v Madison Sales Corp.,* 521 F.2d 1210 (1975).

Under Connecticut law, judgment entered before return day is void. *Jepsen v Toni Co.,* 20 Conn. Supp. at p. 294.

Improper return day affects court's jurisdiction. *Brandiff v Sellas,* (1985) 40 Conn. Supp. 243, 488 A 853.

Notwithstanding the citation shown in Ex. #1 of the Public Land Records of the Town of East Granby, Connecticut at Vol. 59, p. 661 in the present action before the court, there was: *NO NOTICE, NO SERVICE, NO RETURN OF PROCESS TO THE COURT* – and *NO JURISDICTION FOR THE CONNECTICUT COURTS UPON WHICH TO PASS JUDGMENT, OR PAY COMPENSATION.*

4. **The petition for the annulment of the extrajudicial judgments was filed upon the ground that – the action of the government (Federal Aviation Administration, United States Army Corps of Engineers) has been such as to impose a servitude upon the property which interferes with the use, management, or enjoyment of the same – without compensation.**

Where it is apparent that the United States is the owner, and has exclusive jurisdiction, of certain navigational instrumentation on the surface of private property of plaintiff, and "agents" under grant-agreements have been in the process of attempting to acquire, by various means, an adequate property interest for the past three (3) decades, the UNITED STATES must be a necessary party to any such suit, judgment, or other procedure.

The National government is guardian of a public right of access to navigable airspace of the United States.

The navigational servitude is the legal formula by which we recognize the paramount nature of this governmental responsibility.

It is a well established rule that in any kind of action or suit, in order that a valid judgment may be rendered, all necessary and essential parties must be before the court, and that those who are necessary parties are such persons, or entities, as have or claim a direct interest in the object and subject matter of the suit and whose interests will necessarily be affected. *Belt v Texas Co.*, 175 S.W. 2d 622; *Colorado River Water Cons. Dist. v United States*, 424 U.S. 800.

Under the logic of *Pennsylvania Coal Co. v Mahon*, 260 U.S. 393 (1922), the invasion, appropriation, erection of navigational instrumentation on surface of private property by the F.A.A. was a "taking" – requiring payment of fair market value compensation.

If the government physically invades only an easement in property, it must nonetheless pay compensation. *United States v Causby*, 328 U.S. 256, 265 (1946).

Quoting from *Griggs v Allegheny County*, 369 U.S. 84 at p. 93, Supreme Court Justice Black with Justice Frankfurter concurring said: "Merely because local communities might eventually be reimbursed for the acquisition of necessary easements does not mean that local communities must acquire easements that the United States has already acquired." And, at p. 94, "Having taken the airspace over Griggs private property for a public use, it is the United States which owes just compensation."

The Army Corps of Engineers, in concert with the Air National Guard and Connecticut Department of Transportation, having invaded Parcel "A", a separate and distinct parcel from the F.A.A. invasion, on February 1, 1991, without a search of the land records, without notice, without compensation, is a *TRESPASSER*.

5. The petition for the annulment of the extrajudicial judgments was filed upon the ground that the action, or INACTION of the Connecticut Department of Transportation has been a medley of continuing official acts constituting interference with the owner's use and enjoyment of his property dating back to November 12, 1964 – Without just compensation, without due process.

It is Hornbook law that "any judgment should conform to pleadings, issues and prayers for relief." *Kawasaki, Kissen, Kaisha, Ltd. v Indomar, Ltd.*, 173 Conn. 269, 377 A2d 316; *Brill v Ulrey*, 159 Conn. 371, 269 A.2d 262; *Morici v Jarvie*, 137 Conn. 97, 75 A.2d 47; *Shaw v Spelke*, 110 Conn. 208, 147 A 675; *Steinmetz v Steinmetz*, 125 Conn. 663, 7 A.2d. The Connecticut Supreme Court had occasion to discuss this principle in *New Haven Sandblast Co. v Dreisbach*, 104 Conn. 322, 330, 133 A 99. In that case, the court stated:

> A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid judgment.

133 A at 102 (citation omitted). The Court also stated, quoting Black on Judgments (2d Ed.) Vol. I, § 215:

> Besides jurisdiction of the person of the defendant and of the general subject-matter of the action, it is necessary to the validity of the judgment that the court should have had jurisdiction over the precise question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant

> * * * and third, the point decided must be in substance and effect, within the issue.
>
> 133 A at 102 (citations omitted)

Finally, the court cited with approval the case of *Lilly v Claypool*, 53 S.E. 22, 24, 59 W. Va. 130, 133: "There is no principle better settled than that a judgment or decree cannot be entered in the absence of pleadings upon which to found the same." 133 A at 102 (citations). (See also *Case v Bush*, 93 Conn. 550, 552, 106 A 822 – indicating that the variance between the judgment and the issues raised is jurisdictional.)

It is significant that in *New Haven Sandblast Co.*, supra, the court was asked to issue a ruling based upon stipulated, rather than actual facts. The court expressly found that the agreement of the parties was not sufficient to constitute a waiver and could not "confer jurisdiction upon the Trial Court."

THE DECISION BELOW IS INCORRECT

Clearly, the opinion of the Second Circuit, as expressed, is to circumvent the public policy promulgated, which is error, and the reliance on *Simmons v Wetherell*, #163875, a private damage action of petitioner, in lieu of proceedings being instituted by defending federal and state agencies – is in complete derogation of the due process clause of the Fifth and Fourteenth Amendments and represents conflicts with every other circuit. See *Noble v Union River Logging R.R.*, 147 U.S. 165.

The relevant principles of equity, comity, and federalism "have little force in the absence of a pending state proceeding." *Lake Carriers Assn. v MacMullan*, 406 U.S. 498, 509 (1972).

The critical point of departure by the Second Circuit from the Supreme Court's decision in *Lynch v Household Finance Co.*, 405 U.S. 538, is a seizure judgment entered without the parties, without proceeding under a court order, without the service of summons or any return to the court, notwithstanding that federal law and regulations were applicable, controlling, completely ignored, with the transcending of power from plaintiff's tort action, *Simmons v Wetherell*, supra.

The Second Circuit's unreported opinion is contrary to the reported decision of this same court in 1973, 472 F.2d 509, wherein the facts remain the same, no proceedings instituted nor any compensation paid and is contrary to the Supreme Court ruling in *Abdo Ahmed Nagi v United States*, 751 F.2d 826 (1985) wherein the court ruled that the mechanical interpretation and application of the regulations runs counter to the congressional objectives of the statutes, thus violating the spirit and intent of that portion of the Uniform Act (42 U.S.C. §§ 4651-4655).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the Second Circuit Court of Appeals on this unconstitutional seizure.

Respectfully submitted,

/s/ Augustus J. Simmons
AUGUSTUS J. SIMMONS, Petitioner
P. O. Box #1
Windsor, CT 06095
(203) 569-6714

APPENDIX

INDEX TO APPENDIX

Page

APPENDIX – A

PETITION FOR REHEARING IN BANC BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (FEBRUARY 7, 1995) 1a

APPENDIX – B

UNREPORTED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (DECEMBER 21, 1994) 2a

APPENDIX – C

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (MAY 27, 1994) 5a

APPENDIX – D

UNREPORTED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (FEBRUARY 23, 1993) 7a

APPENDIX – E

JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (JULY 13, 1992) 14a

APPENDIX – F

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (MAY 18, 1988) 17a

APPENDIX – G

UNREPORTED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (SEPTEMBER 14, 1988) 19a

INDEX TO APPENDIX – Continued

Page

APPENDIX – H

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (APRIL 10, 1985) 22a

APPENDIX – I

UNREPORTED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (NOVEMBER 22, 1985)..... 23a

APPENDIX – J

PETITION FOR REHEARING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (FEBRUARY 10, 1984) ... 25a

APPENDIX – K

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (AUGUST 24, 1983)..... 27a

APPENDIX – L

UNREPORTED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (DECEMBER 20, 1983) 29a

APPENDIX – M

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT FOR PRELIMINARY INJUNCTION (AUGUST 17, 1983)..... 32a

INDEX TO APPENDIX – Continued

Page

APPENDIX – N

RULING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (FEBRUARY 7, 1983) 33a

APPENDIX – O

UNREPORTED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (JUNE 9, 1983)..... 39a

APPENDIX – P

RULING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (APRIL 3, 1972)..... 42a

APPENDIX – Q

REPORTED DECISION IN PART AND REMAND IN PART BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT – (472F2d509) (JANUARY 19, 1973) 52a

APPENDIX – R

PRESIDENTIAL MEMORANDUM TO IMPROVE ADMINISTRATION AND IMPLEMENTATION OF THE UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970 (FEBRUARY 27, 1985)..... 61a

APPENDIX – S

EXECUTED LEASE BETWEEN STATE OF CONNECTICUT, DEPARTMENT OF TRANSPORTATION, AND UNITED STATES OF AMERICA, BY FEDERAL AVIATION ADMINISTRATION (JUNE-1974)..... 63a

APPENDIX A

UNITED STATES DISTRICT COUPT

DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS

v. CIVIL NO. 3:94cv778 (AHN)

DAVID R. HINSON, et al

JUDGMENT

(Filed May 27, 1994)

This cause came on for consideration on plaintiff's complaint before the Honorable Alan H. Nevas, United States District Judge, and

The Court having considered the complaint and all the papers submitted in connection therewith filed its order finding that in light of Judge Cabranes' mandate, the underlying complaint should never have been docketed and further ordered the case dismissed with prejudice,

It is therefore **ORDERED** and **ADJUDGED** that the complaint be and hereby is dismissed with prejudice, in accordance with the court's order.

Dated at Bridgeport, Connecticut this 27th day of May, 1994.

KEVIN F. ROWE, Clerk
By /s/ Carol E. Cannady
Carol E. Cannady
Deputy in Charge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of December, one thousand nine hundred and ninety-four.

PRESENT: HONORABLE JON O. NEWMAN,
Chief Judge.
HONORABLE J. EDWARD LUMBARD,
Circuit Judge.*

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v. 94-6156

DAVID R. HINSON, Administrator, Federal Aviation Administration; HENRY J. HATCH, Lt. Gen., Chief Engineer, United States Army Corps of Engineers; EMIL H. FRANKEL, Commissioner of Transportation; JOHN J. COLLINS, Col.; STATE OF CONNECTICUT, Richard Blumenthal, Attorney General; JOHN J. BARTIZEK, District Clerk; EDWARD ROGIN, SR., and ROBERT HIRTLE, JR.,
Defendants-Appellees.

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* Honorable Thomas J. Meskill, Circuit Judge, originally a member of the panel, recused himself after oral argument, and the appeal is being disposed of by the remaining members of the panel, who are in agreement. *See* Second Circuit Local Rule § 0.14(b).

ORDER

(Filed Dec. 21, 1994)

Appeal from the United States District Court for the District of Connecticut (Alan H. Nevas, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant *pro se*, and submitted by appellee.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Augustus J. Simmons appeals *pro se* from the May 27, 1994, judgment dismissing *sua sponte* his suit, purportedly filed under Fed. R. Civ. P. 60(b), to set aside rulings of the Connecticut Superior Court. This filing is the latest in a series of actions filed in state and federal courts, in which Simmons is endeavoring to relitigate a dispute that arose in 1971 concerning real property. We previously affirmed the District Court's dismissal of a prior suit by Simmons, a ruling that included an injunction prohibiting Simmons from further attempts to relitigate his claim. *Simmons v. Burns*, No. 88-6093 (2d Cir. Sept. 14, 1988). Despite that injunction, Simmons has filed the current suit. Judge Nevas properly dismissed the suit as filed in violation of the injunction.

On the prior appeal, Simmons was warned that violation of the injunction may be punished, a warning he has ignored. He still remains subject to contempt penalties for the current filing and for any future effort to relitigate his

claim. On the pending appeal, we affirm the judgment of the District Court, and, pursuant to Fed. R. App. P. 38, order Simmons to show cause within ten days why he should not be assessed damages for a frivolous appeal in the amount of $5,000, in addition to normal taxable costs.

/s/ John O. Newman
Chief Judge.
/s/ J. Edward Lumbard
Circuit Judge.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

NHCT
94-cv-778
Nevas, J.

GEORGE LANGE III
CLERK

At a stated term of the United States Court of appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of February one thousand nine hundred and ninety-five.

Augustus J. Simmons,

Plaintiff-Appellant,

v.

Docket No. 94-6156

(Filed Feb. 7, 1995)

David Hinson, Administrator, Federal Aviation Administration, Henry J. Hatch, Lt. Gen., Chief Engineer United States Army Corps of Engineers, Emil H. Frankel, Commissioner of Transportation, Attorney General; John J. Bartizek, District Clerk, Edward Rogin, Sr. and Robert Hirtle, Jr.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Augustus J. Simmons.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Carolyn Clark Campbell,
Carolyn Clark Campbell,
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held that the United States Courthouse in the City of New York, on the 23rd day of February, one thousand nine hundred and ninety three.

Present:

Honorable John M. Walker, Jr.,
Honorable Joseph M. McLaughlin,
Circuit Judges

Honorable Charles L. Brieant,
*Chief District Judge**

AUGUSTUS J. SIMMONS,

Plaintiff-Appellant

v.

ORDER
No. 92-6208
(Filed Febr. 23, 1993)

EMIL H. FRANKEL., Commissioner of Transportation, BARRY L. HARRIS, Administrator, Federal Aviation Administrator, HENRY J. HATCH, General Chief Engineer U.S. Army Corps. of Engineers, JOHN J. BARTIZEK, District

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* Chief Judge Charles L. Brieant, United States District Court for the Southern District of New York, sitting by designation.

Clerk, Metropolitan District Commission., UNITED STATES OF AMERICA, STATE OF CONNECTICUT, JOHN J. COLLINS, Lt. Col., Administrator, FAA,

Defendant-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This cause came to heard [sic] on the transcript of record from the United States District Court for the District of Connecticut (Dorsey, *J.*) and was argued by appellant, while counsel for appellees relied on their submissions.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said district court be and it hereby is AFFIRMED, and appellant is assessed double court costs.

Augustus J. Simmons, *pro se*, appeals from an order of the United States district Court for the District of Connecticut (Dorsey, *J.*), dismissing his complaint *sua sponte* and ordering Simmons to pay $2000 in fines.

On June 5, 1992, Simmons brought an action, pursuant to 42 U.S.C. § 1983, alleging various constitutional violations arising from Connecticut's acquisition of land owned by Simmons. the district court concluded that Simmons was attempting to reassert federal constitutional and statutory claims that were fully adjudicated in prior proceedings in violation of an injunction issued against him, and dismissed his complaint *sua sponte* on July 14, 1992. The court also ordered Simmons to pay

fines in the amount of $1000 to the State of Connecticut and $1000 to the United States.

The long history of this litigation began in 1964, when the State of Connecticut attempted to condemn property in East Granby, Connecticut, then owned by the Simmons's family, to expand what is now the Bradley International airport. Simmons filed various state and federal actions, later consolidated in Connecticut Superior Court, alleging that the State illegally occupied portions of his land and challenging the State's attempt to gain title to the property. On January 4, 1978, a judgment was entered, pursuant to a stipulation between the parties, providing that the State would take title to certain parcels of Simmons' land, in return for which the State would pay Simmons $385,000. The stipulation further provided that the "judgmenet entered in this matter [shall] be a full and final settlement between the parties of any and all claims contained in the above consolidated cases." However, six months later Simmons moved to open the judgment claiming ineffective assistance of counsel. This request was denied and the denial was affirmed on appeal. *Simmons v. Wetherall*, 180 Conn. 587 (1980) (per curiam).

Not dissuaded by the final judgment granting title of the disputed real property to the State of Connecticut, Simmons continued to pursue the issue. Simmons filed seven state and five federal proceedings after the 1978 stipulation was certified. Then in a 1988 order, Judge Cabranes enjoined Simmons from filing "any state or federal claims in any federal court against any of the defendants named in the complaint in this lawsuit if such lawsuit related to his alleged ownership" of the disputed

real property. Affirming judge Cabranes's order in all respects, this Court warned that any violation of that injunction could be punished as contempt of court and imposed double court costs against Simmons. *Simmons v. Burns*, No. 88-6093 (2d Cir. Oct. 5, 1988) (unpublished summary order).

Despite this Court's attempt to stem the flow of vexatious litigation by Simmons, we are confronted once again with an attempt by him to litigate a matter barred by res judicata. Notwithstanding Simmons's attempt to circumvent the injunction by changing the named defendants, the instant complaint clearly relates to Simmons's ownership of the East Granby land. Thus, Simmons has violated Judge Cabranes's injunction. Furthermore, even without the injunction, Judge Dorsey's dismissal of the complaint *sua sponte* would be affirmed based on res judicata grounds.

Both the state and federal defendants have asked the district court to impose sanctions on Simmons in order to deter him from continuing his attempts to reopen this litigation. *Pro se* litigants are subject to sanctions under Fed. R. Civ. P. 11. *See Maduakolam v. Columbia Univ*, 866 F.2d 53, 56 (2d Cir. 1989). Furthermore, this Court has not hesitated to impose sanctions on *pro se* litigants when they become particularly vexatious. *See Sassower v. Field*, 973 F.2d 75 (2d Cir. 1992) (upholding sanction of $93,350 against vexatious plaintiff).

The district court's order dismissing *sua sponte* Simmons's complaint and imposing $2,000 in fines is hereby

AFFIRMED. Furthermore, we hereby assess double court costs against Simmons pursuant to Fed. R. App. P. 38.

/s/ John Walker
Hon. John M. Walker, Jr.,
U.S.C.J.

/s/ Joseph M. McLaughlin
Hon. Joseph M. McLaughlin,
U.S.C.J.

/s/ Charles Brieant
Hon. Charles L. Brieant,
U.S.D.J.

N.B. *THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.*

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of February, one thousand, nine hundred and ninety three.

Present:

Honorable John M. Walker, Jr.,
Honorable Joseph M. McLaughlin,
Circuit Judges,

Honorable Charles L. Brieant,
*Chief District Judge.**

AUGUSTUS J. SIMMONS,

Plaintiff-Appellant,

v.

ORDER
No. 92-6208
(Filed Febr. 23, 1993)

EMIL H. FRANKEL, Commissioner of Transportation, BARRY L. HARRIS, Administrator, Federal Aviation Administrator, HENRY J. HATCH, General, Chief Engineer U.S. Army Corps. of Engineers, JOHN J. BARTIZEK, District Clerk, Metropolitan District Commission., UNITED STATES OF

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*Chief Judge Charles L. Brieant, United States District Court for the Southern District of New York, sitting by designation.

AMERICA, STATE OF CONNECTICUT,
JOHN J. COLLINS, Lt. Col.,
Administrator, FAA,

Defendant-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This cause came to heard on the transcript of record from

Dismissed sua sponte.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS	)	2:92 CV 00395 PCD
VS.	)	
	)	
EMIL H. FRANEL, et al.	)	

JUDGMENT

(Filed July 13, 1992)

The action having come on for consideration of the plaintiff's complaint before the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Order, dismissing the complaint as violative of the 1988 injunction,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered dismissing the complaint.

Dated at Hartford, Connecticut this 13th day of July 1992.

KEVIN F. ROWE, Clerk

By /s/ Dennis P. Iavarone
Dennis P. Iavarone
Deputy in Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS	:	Docket No.
	:	2:92cv00395 (PCD)
-vs-	:	
	:	(Filed July 8, 1992)
EMIL H. FRANEL, et al.	:	

ORDER

The claims asserted in Mr. Simmons' most recent complaint pertain to his claim of title and interest to or in three parcels of land n [sic] East Grandby, Connecticut, adjacent to Bradley International Airport. Although the defendants are changed – for example, Emil Frankel only recently became Connecticut's Transportation Commissioner – the heart of the controversy remains the same. This case thus asserts the same rights Mr. Simmons has repeatedly asserted in various lawsuits filed during the past decade, despite the Connecticut Supreme Court's final determination that he no longer retained any rights to the land in question, *Simmons v. Wetherall*, 180 Conn. 587 (1980), and despite an injunction issued in 1988 prohibiting him from filing such actions without first obtaining permission from this court. *Simmons v. Burns*, Civil No. H-87-732 (JAC) (D. Conn. Mar. 15, 1988), Ruling on Pending Motions and Order. Mr. Simmons fails to accept the fact that he may not attempt, over and over again, to retry his claims to the land, even in the face of the Court of Appeals' warning that such repeated attempts would result in sanctions. *Simmons v. United States*, Docket No. 85-6087 (2d Cir. Nov. 22, 1985).

The time has come to put an end to Mr. Simmons' vexatious, annoying and unjustified attempts to re-litigate claims which have been finally decided for over a decade. Thus, it is hereby

ORDERED that the complaint be dismissed as violative of the 1988 injunction; and it is further

ORDERED that Mr. Simmons may file, on or before July 24, 1992, any pleading showing why he should not be ordered to pay the sum of $1000 to the State of Connecticut, and an additional $1000 to the United States, as sanctions for the filing of this frivolous lawsuit.

Dated at Hartford, Connecticut, this 8th day of July, 1992

/s/ Peter C. Dorsey
Peter C. Dorsey
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS

v.

WILLIAM BURNS, Commissioner, ALLAN McARTOR, Adm., FAA, ATTY, EDWARD ROGIN, JULIA Z. TASHJIAN, THOMAS P. BYRNE, CONNECTICUT NATIONAL BANK AND TRUST, JEROME DIAMOND, LEONIDAS D. SIMMONS, LEONARD ALLAIRE, MARIE ALLAIRE, PATSY VALENTE, ERNESTINE VALENTE, ANGELO RONCARI, ATTY. GERALD A. ROISMAN, JOHN J. ROWLSON, JOHN MASSOW, FLORENCE MASSOW, ALBERT ENDEE, JOHN KATAJA, ATTY. MARGARET DEAN, GERALD F. MIKULSKE, RONALD MUSKATALLO, ATTY. RONALD CASSIDENTO, STEPHEN SILVERMAN, ATTY. ROBERT HIRTLE, DAVID SALZMAN, FRANK ROTHAMMER, JOHN J. BARTIZEK and ROCCO D'ESTITO

CIVIL NO. H-87-732 (JAC)

FINAL JUDGMENT

This cause came on for consideration on plaintiff's motion for reconsideration of the Court's Ruling on Pending Motions and Order, filed March 15, 1988, before the Honorable Jose A. Cabranes, United States District Judge, and the issues having been duly reconsidered and a Ruling on Plaintiff's Objection to Court's Ruling of March 15, 1988, having been filed on May 16, 1988, denying motion to reconsider and dismissing all remaining claims against all remaining defendants, pursuant to Rule 11, Fed.R.Civ.P.,

It is ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of all remaining defendants (summary judgment having been entered in favor of defendants Burns, Comm., McArtor, Adm. of FAA, Rogin, Tashjian and Hirtle on March 16, 1988) dismissing the complaint.

Dated at New Haven, Connecticut, this 18th day of May, 1988.

KEVIN F. ROWE
Clerk, United States District Court

By .....
Deputy in Charge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of September, one thousand nine hundred and eighty-eight.

Present:

HONORABLE J. EDWARD LUMBARD,
HONORABLE J. DANIEL MAHONEY,
Circuit Judges,

HONORABLE CON. G. CHOLAKIS,
*District Judge.**

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

J. WILLIAM BURNS, ET AL.,
Defendants-Appellees.

ORDER 88-6093

Appeal from the United States District Court for the District of Connecticut.

This cause came to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant pro se and by counsel for appellees.

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* Hon Con. G. Cholakis, District Judge, United States District Court for the Northern District of New York, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said district court be and it hereby is AFFIRMED, and appellant is assessed double court costs.

1. We affirm for the reasons stated in the ruling of the district court. We also consider this a frivolous appeal. This is appellant's third appearance before this court in the past five years, and on each occasion res judicata barred or bars his reassertion of the same claims which were either fully litigated or should have been litigated in prior state and federal proceedings. In his last appearance before this court, *Simmons v. United States of America, et al.*, Docket No. 85-6087 (2d Cir. Nov. 22, 1985) (unpublished order), appellant Simmons was placed on notice that he risked imposition of sanctions should he seek to appeal the same matters again.

2. It is accordingly appropriate to assess double court costs against appellant pursuant to Fed. R. App. P. 38.

3. We specifically call to appellant's attention that we affirm the order of the district court in all respects, including its injunction against further federal litigation concerning these claims, and that any violation of that injunction may be punished as a contempt of court.

J. Edward Lumbard,
J. Daniel Mahoney,
Circuit Judges

Con. G. Cholakis,
District Judge

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS

v.

UNITED STATES OF AMERICA, ET AL

CIVIL H-85-45 MJB

JUDGMENT

This action having come on for consideration of the defendants' motions to dismiss before the Honorable M. Joseph Blumenfeld, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having granted the motions,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered dismissing the plaintiff's complaint.

Dated at Hartford, Connecticut, this 10th day of April 1985.

KEVIN F. ROWE, *Clerk*

By: DENNIS P. IAVARONE
Deputy-in-Charge

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of November, one thousand nine hundred and eighty-five.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE WALTER R. MANSFIELD,
HONORABLE JAMES L. OAKES,
Circuit Judges.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

- against -

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees.

85-6087

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

We agree with the April 8, 1985, order of the district court dismissing appellant's claims on the ground of res judicata. We also consider this a frivolous appeal. Appellant has litigated the same matters numerous times before in both state and federal courts over a period of many years. Because appellant is a pro se litigant, we are not imposing sanctions at this time. However, appellant is hereby placed on notice that he risks imposition of sanctions in the future should he seek once again to relitigate these same matters.

WILFRED FEINBERG,
Chief Judge

WALTER R. MANSFIELD,
JAMES L. OAKES,
Circuit Judges

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in related cases before this or any other court.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 10th day of February, one thousand nine hundred and eight-four.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

ARTHUR B. POWERS,
Commissioner of Department of Transportation,
Defendant-Appellee.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ELIZABETH DOLE, Secretary of United States Department of Transportation, FEDERAL AVIATION ADMINISTRATION, J. LYNN HELMS, Administrator, STATE OF CONNECTICUT, J. WILLIAM BURNS, Commissioner of Connecticut Department of Transportation and CONNECTICUT DEPARTMENT OF TRANSPORTATION,
Defendants-Appellees.

No. 83-6257

A petition for a rehearing having been filed herein by plaintiff-appellant, Augustus J. Simmons, *pro-se,*

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO, *Clerk*

by FRANCIS X. GINDHART,
Chief Deputy Clerk

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS,

v.

UNITED STATES OF AMERICA, ELIZABETH DOLE, Secretary of United States Department of Transportation; FEDERAL AVIATION ADMINISTRATION; J. LYNN HELMS, Administrator; STATE OF CONNECTICUT; J. WILLIAM BURNS, Commissioner of Connecticut Department of Transportation

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AUGUSTUS J. SIMMONS

v.

ARTHUR B. POWERS, COMMISSIONER, DEPARTMENT OF TRANSPORTATION

No. H81-778
and No. 83-225

JUDGMENT

These consolidated actions having come on for consideration of the Defendants' Motions to Dismiss before the Honorable Jose A. Cabranes, United States District Judge; and,

The Court having considered the full record of the case including the applicable principles of law, and the Court having filed its endorsements on August 16, 1983, granting Defendants' motions,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in

favor of the Defendant dismissing the Plaintiff's complaints.

Dated at Hartford, Connecticut, this 24th day of August, 1983.

SYLVESTER A. MARKOWSKI,
Clerk, United States District Court

By .....
JOHN K. HENDERSON, JR.
Deputy in Charge

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of December, one thousand nine hundred and eighty-three.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE HENRY J. FRIENDLY
HONORABLE JAMES L. OAKES
Circuit Judges.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

ARTHUR B. POWERS, etc.,
Defendant-Appellee.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA, ET AL.,
Defendant-Appellee

No. 83-6257

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed as follows:

1. This appeal arises out of a dispute over title to and use of land adjacent to Bradley International Airport. It concerns two actions, filed by appellant in the United States District Court for the District of Connecticut, and directed against various state and federal defendants. The complaint in the first case, Civ. No. H-81-778, was filed in October 1981, and subsequently amended. On February 7, 1983, judge Cabranes granted the federal defendants' motion to dismiss. Simmons appealed, and this court, by order dated June 9, 1983, dismissed the appeal for lack of jurisdiction because the dismissal of the claim against the federal defendants did not constitute a final judgment of the district court. We stated that, to pursue the appeal, Simmons would have to seek the entry of a final judgment as to the federal defendants, or await the determination of the claims against the state defendants.

2. On March 22, 1983, appellant filed the complaint in the second case, Civ. No. H-83-225. On May 23, 1983, Judge Cabranes granted a motion by the State of Connecticut to consolidate both cases. On August 16, 1983, Judge Cabranes dismissed the complaints in the consolidated actions. Simmons now appeals from that dismissal. We agree with Judge Cabranes that the doctrine of res

judicata bars the reassertion of these claims, already litigated in state courts. Simmons v. Wetherall, 430 A.2d 1296 (Conn. 1980).

3. The judgment of the district court is affirmed.

WILFRED FEINBERG,
Chief Judge

HENRY J. FRIENDLY,
JAMES L. OAKES,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX M

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS,

Plaintiff.

v.

J. WILLIAMS BURNS, AS HE IS THE COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF TRANSPORTATION, AND J. LYNN HELMS, AS HE IS THE ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION

Defendants.

No. 81-778
Appeal No. 83-5141

PLAINTIFF'S MOTION FOR "FINAL DECISION" ON WITHHOLDING OF FEDERAL FUNDS FOR ALL AIRPORT DEVELOPMENT AT BRADLEY INTERNATIONAL AIRPORT
(Preliminary Injunction)

DENIED as moot, in view of the court's disposition of the case. *See* the court's endorsement order (filed Aug. 16, 1983) of the federal defendants' motion to dismiss and the court's endorsement order (filed Aug. 17, 1983) of the state defendants' motion to dismiss. It is so ordered.

JOSE A. CABRANES, U.S.D.J.

August 17, 1983, Hartford, CT

APPENDIX N

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS

v.

UNITED STATES OF AMERICA, FEDERAL AVIATION ADMINISTRATION, J. LYNN HELMS, Administrator, Federal Aviation Administration, STATE OF CONNECTICUT, CONNECTICUT STATE DEPARTMENT OF TRANSPORTATION, and J. WILLIAM BURNS, Commissioner, Connecticut State Department of Transportation

No. H 81-778

RULING ON THE FEDERAL DEFENDANTS' MOTION TO DISMISS

JOSE A. CABRANES, *District Judge:*

This procedurally convoluted action arises out of a dispute between plaintiff and various defendants concerning the use of several parcels of land in the town of East Granby, Connecticut. On November 8, 1982, plaintiff filed his third Amended Complaint, and on December 21, 1982 the federal defendants (the United States of America, the Federal Aviation Administration, and J. Lynn Helms as Administrator of the Federal Aviation Administration) filed a motion to dismiss the claims asserted against them, pursuant to Rule 12(b)(1) and (6), Fed. R. Civ. P. Because this court concludes that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim [against these defen-²dants] which

would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), the motion to dismiss must be granted.

I.

The first count of the Third Amended Complaint alleges a claim under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* The pertinent allegations of count one are that the "FAA has placed a middle marker on Parcel C [of which plaintiff alleges he is the owner] and an Instrument Landing System," Third Amended Complaint, ¶ 30; that "the United States government and the FAA have ousted the Plaintiff from possession of this land since 1964," ¶ 33; and that "the United States and the FAA have never compensated the Plaintiff for their use of Parcels A and C," ¶ 34. According to plaintiff, the instrument landing system was emplaced in 1960, ¶ 6, the middle marker in 1974, ¶ 7.

The statute of limitations for the Federal Tort Claims Act is 28 U.S.C. §2401(b), which provides in pertinent part that a tort claim against the United States will be barred unless "presented in writing to the appropriate Federal Agency within two years after such claim accrues. . . . " It is undisputed that plaintiff did not commence this action until 1981. Plaintiff does not allege that he filed any federal court action or agency claim before that time.

Plaintiff contends, however, that his claim is not time-[3]barred. That contention derives from plaintiff's reading of two cases, *United States v. Dickinson*, 331 U.S. 745 (1947), and *United States v. One 1961 Red Chevrolet*

Impala Sedan, 457 F.2d 1353 (5th Cir. 1972). This Court is not persuaded that either case cited is on point.

In *Dickinson*, the United States had constructed a dam, and as a result the plaintiff's land was periodically flooded. The dam was completed in 1936, the first flood occurred in 1937, more extensive flooding took place in 1938, and the plaintiff brought suit in 1943; a six-year statute of limitations was applicable. The Supreme Court held that the action was not time-barred. In *Dickinson*, the plaintiff argued that the Government's action was, before 1938, ambiguous: before the first flood occurred, there was no indication that a taking had occurred or would occur; and before the extensive flood of 1938, it was still uncertain that the Government's intrusion upon the plaintiff's land was sufficient to constitute a taking, or, assuming that there was a taking, it was too soon to determine the extent thereof. The *Dickinson* plaintiff argued, and the Supreme Court agreed, that it was not until 1938 that the fact and the extent of the taking were clear. As Justice Frankfurter, writing for the court, put it: "An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be[4] struck," *United States v. Dickinson, supra*, 331 U.S. at 749. In the case at bar, however, the Third amended Complaint can only be read as stating that the Government's alleged tort was complete in 1974. According to the complaint, the alleged tort was neither uncertain nor ambiguous at that time; its extent was apparent; and nothing is alleged to have happened between 1974 and 1981 that changed the nature or extent of the alleged tort.

In *One 1961 Red Chevrolet*, the Fifth Circuit held that, where a change of law creates a new right, a cause of action may, for limitation purposes, accrue at the time of that change of law rather than when the alleged wrong occurred. In the case at bar, however, plaintiff has not alleged any change in the general law. Rather, he has simply alleged that a prior adjudication of his rights with respect to the parcels in question occurred in 1980. Clearly, an application of law, albeit one that changes the legal relations between two parties, is not the same thing as a change in the law. Thus, *One 1961 Red Chevrolet* – which, at any rate, represents the law of a circuit other than our own – has no bearing on the case before this court today.

In short, count one of the Third Amended Complaint is barred by 28 U.S.C. § 2401(b) and is accordingly dismissed.

II.

In count three of the Third Amended Complaint, plaintiff alleges numerous violations of unspecified "Federal law," ¶¶ 540-46, 49-51, and some specific violations of the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601 *et seq*. Where violations of that Act are alleged, plaintiff claims the FAA was derelict in fulfilling its statutory obligations in dealing with the State of Connecticut, ¶¶ 47-48, 52-54.

The Government contends that a private right of action will not lie against it to compel fulfillment of such obligations. While this question has not yet been presented to the Court of Appeals for the Second Circuit,

those courts of appeals that have considered this issue have unanimously concluded that the "plain language," *Fountain v. Metropolitan Atlanta Rapid Transit Authority*, 678 F.2d 1038, 1045 n. 13 (11th Cir. 1982), of 42 U.S.C. § 4602(a) precludes such a right. *See Fountain v. Metropolitan Atlanta Rapid Transit Authority, supra; Roth v. United States Department of Transportation*, 572 F.2d 183, 184 (9th Cir. 1978); *Rhodes v. City of Chicago*, 516 F.2d 1373, 1377-1378 (7th Cir. 1975); *Will-Tex Plastics Manufacturing, Inc. v. Department of Housing and Urban Development*, 345 F. Supp. 654 (E.D. Pa. 1972), *aff'd* 478 F.2d 1399 (3rd Cir. 1973). The exception cited by plaintiff as applicable where a plaintiff is a third-party beneficiary to a contract between federal and state governments is clearly without relevance here, where plaintiff has not claimed to be a third-party beneficiary – indeed, where such a claim would be contrary to the entire thrust of the complaint.[6]

Thus, count three of the Third Amended Complaint fails to state a claim for relief cognizable under 42 U.S.C. §§ 4601 *et seq.* and is accordingly dismissed.

III.

The federal defendants have also moved to dismiss count five of the third Amended Complaint. Count five concerns enforceability of a stipulation entered into by plaintiff and the State of Connecticut. It does not appear to this court that count five runs against the federal defendants, and therefore that portion of the federal defendants' motion to dismiss that attacks count five is denied as moot, without prejudice to renewal if it should

appear hereafter that plaintiff means count five to run against the federal defendants.

IV.

In summary, the federal defendants' motion to dismiss the Third Amended Complaint insofar as it states claims against them is granted with respect to count one, granted with respect to count three, and denied as moot with respect to count five, without prejudice to renewal. Counts two and four of the Third Amended Complaint do not state claims against any of the federal defendants.

It is so ordered.

Dated at Hartford, Connecticut, this 7th day of February,[7] 1983.

JOSE A. CABRANES
United States District Judge

APPENDIX O

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of June, one thousand nine hundred and eighty-three.

Present:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE HENRY J. FRIENDLY
HONORABLE RALPH K. WINTER
Circuit Judges.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

– against –

UNITED STATES OF AMERICA, FEDERAL AVIATION ADMINISTRATION, ET AL.
Defendants-Appellees.

No. 83-6043

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeal from the

judgment of said District Court be and it hereby is dismissed for lack of jurisdiction.

1. This appeal arises out of a dispute over title to and use of land adjacent to Bradley International Airport in Connecticut that has been going on between appellant and the governments of the United States and Connecticut for many years. The third amended complaint in the instant case against various federal and state defendants was filed in November 1982. In an opinion dated February 7, 1983, Judge Jose A. Cabranes dismissed all the counts that he found to be directed against the federal defendants, finding that count one was barred by the applicable statute of limitations and that count three failed to state a claim for relief.

2. Because the claims against the state defendants are still pending before the district court, the dismissal of the claims against the federal defendants is not a final judgment, and cannot be appealed, unless the district court determines that "there is no just reason for delay" and expressly directs the entry of a final judgment. Fed. R. Civ. P. 54(b). Judge Cabranes did not to do so in his opinion of February 7. This court is therefore without jurisdiction to hear this appeal, which is dismissed without prejudice. Appellant may seek the entry of final judgment as to the federal defendants in the district court, or he may await the final determination of his remaining claims before appealing all claims to this court.

3. Shortly before oral argument, appellant also moved in this court for a preliminary injunction "against project applications for airport development." The relief sought is the "withholding of federal funds for all airport

development at Bradley International Airport per 49 USC 1716(c) until such time as clear title to 'clear zone' is fully and adequately required." Judge Cabranes denied a request for similar relief in the district court on May 16, 1983, on the ground that relief was sought against the federal defendants only, as to whom the complaint had already been dismissed. In view of our disposition of the main appeal, this motion is also remanded without prejudice to the district court so that when a final judgment is entered, the entire matter may be addressed by this court at the same time.

WILFRED FEINBERG, *Chief Judge*

HENRY J. FRIENDLY
RALPH K. WINTER, *Circuit Judges.*

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX P

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS

v.

HORACE B. WETHERELL, Director of Aeronautics; DONALD J. LYNCH, Deputy Director of Aeronautics; FRANK C. PARIZEK, EDWARD J. COADY, KINGSLEY GILLESPIE, HUGH C. CURRAN, ARTHUR SACHS and E. DONALD WALSH, The Aeronautics Commission of Connecticut; and HERBERT A. PREISSNER, Manager of Bradley International Airport

Civil No. 14,806

RULING ON DEFENDANTS' MOTIONS TO DISMISS AND TO DISCHARGE ATTACHMENTS

The plaintiff, Augustus J. Simmons, has brought suit under the Civil Rights Act, 42 U.S.C. § 1983, to seek redress against several public officials for two alleged wrongs done to him under color of state law. Jurisdiction is sought under 28 U.S.C. § 1343(3). He complains that certain of his property, principally land abutting a state airport, was taken by the defendants in violation of state law and in violation of the fifth amendment to the United States Constitution;[1] and he complains that the defendants caused him to be illegally arrested, prosecuted and convicted in the state court in violation of his federal civil rights, for cutting through a fence which the defendants

---

[1] The fifth amendment to the United States Constitution provides in pertinent part:

" . . . nor shall private property be taken for public use, without just compensation."

had erected surrounding his property. The defendants have moved to dismiss the complaint on the grounds of sovereign immunity, lack of federal jurisdiction over the subject matter of the complaint, and the tolling of the statute of limitations.

I.

This case has a long and acrimonious history. Taking the facts as stated in the complaint, for purposes of the motion to dismiss, the plaintiff owns about twelve acres of land abutting Bradley International Airport in East Granby, Connecticut. His predecessor in title was his mother, who owned the land when the controversy at the root of this lawsuit began in 1961. At that time, the state Aeronautics Commission began condemnation proceedings against the land under Conn. Gen. Stats. § 15-79 (repealed by 1969 Public Act 768, § 263), which provided in pertinent part:

> "The state or any municipality, or any two or more municipalities jointly, . . . may take any such land or interest therein for such establishment (of an airport) or for the expansion or improvement of an airport when, in the opinion of the (state aeronautics) commission, public convenience or safety requires, and when the approval of the municipality or municipalities in which such land is located has been legally obtained, upon paying just compensation to the owner of such land or interest therein. . . . "

In December 1964 the plaintiff began construction of a restaurant on his land; construction was halted after the foundation had been completed, when the defendants

obtained an injunction against further construction on March 3, 1965, on the ground of the pendency of condemnation proceedings.

Although the defendants, acting for the Department of Aeronautics, were successful at trial on the issue of whether the Aeronautics Commission's decision to take the property was unreasonable or in bad faith, the Connecticut Supreme Court, without considering any other assignments or error, ordered a new trial solely on the ground that error was committed in an evidentiary ruling. *State v. Simmons,* 153 Conn. 351 (1966). At the new trial, the judge ruled that the taking was invalid since the defendants had failed to obtain the approval of the Town of East Granby, as required by Conn. Gen. Stats. § 15-79, *supra.* This decision was affirmed by the Connecticut Supreme Court. *State v. Simmons,* 155 Conn. 502 (1967).

Persisting after these two aborted attempts, on January 9, 1968, the defendants again began condemnation proceedings, this time under Conn. Gen. Stats. § 48-12, the state's general condemnation statute. The plaintiff acknowledges in his complaint that "(t)he effect of this statute was to vest title to the land in the State immediately upon the filing of the statement of condemnation in the Superior Court. . . . " In March 1971 the Connecticut Supreme Court again held the taking illegal, on the ground that takings by the Aeronautics Commission were authorized only by Conn. Gen. Stats. § 15-79, and that the commission could not employ § 48-12. *Simmons v. State,* 160 Conn. 492 (1971).

In August 1968 after the defendants had begun the action under § 48-12 but before the Connecticut Supreme

Court had declared this proceeding invalid, "the defendants caused the plaintiff to be arrested and charged with a criminal offense for cutting a wire fence erected by the defendants around the plaintiff's property. The plaintiff was convicted and sentenced to six months, execution suspended after three months, plus a fine of $250.00."

The plaintiff also alleges that in April 1968 the defendants caused agents or employees of the Department of Aeronautics to remove certain cinder blocks from his property, which they have refused to return to the plaintiff and for which they have paid him no compensation.

The plaintiff also alleges that the defendants caused certain runway lights to be constructed on his property, which are in use at present and for which he has received no compensation.

In the 1969 session of the state General Assembly, the plaintiff was the beneficiary of the following special act:

"AN ACT AUTHORIZING AUGUSTUS
J. SIMMONS
TO SUE THE STATE

> Augustus J. Simmons of Windsor is authorized to bring an action at law against the state not later than the first Tuesday of January, 1970, and to recover such damages as may be awarded to him by said court for loss of use of land owned by him in the town of East Granby. Any action brought in accordance with this act shall be brought to the superior court for Hartford county and no costs or interests shall be included in any judgment against the state. Approved May 28, 1969." Special Act No. 170.

Under this waiver of sovereign immunity, the plaintiff brought suit on January 5, 1970, against the defendants Lynch and Wetherell, and against the state of Connecticut, in the Superior Court for Hartford County, Docket No. 163, 875, seeking damages for the losses he allegedly sustained because of the deprivation of the use of his land for several years. The allegations of that complaint are quite similar to those here, except that the plaintiff does not seek redress for his allegedly illegal arrest and imprisonment.

II.

THE CRIMINAL PROSECUTION

The plaintiff seeks damages for his allegedly illegal arrest and conviction, which he claims were "caused" by the defendants. The court is of the opinion that he has failed to state a federal claim upon which relief may be granted.

The plaintiff acknowledges that he was convicted in a state court for cutting a fence erected by the defendants. He may not collaterally attack that conviction here, in the guise of a civil rights complaint. *Goss v. Illinois*, 312 F.2d 257 (7th Cir. 1963). See also, *Taylor v. New York City Transit Authority*, 433 F.2d 665 (2d Cir. 1970).

Further, his complaint fails to allege that the defendants acted in bad faith; he acknowledges that at the time of the arrest, title to the property had vested, albeit temporarily, in the state, under Conn. Gen. Stats. § 48-12. Public officials are not liable to actions for damages under § 1983 for actions taken in good faith. See *Pierson v.*

Ray, 386 U.S. 547 (1967); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, ___ F.2d ___ (2d Cir. Mar. 8, 1972), slip op. at 2024. The failure to allege lack of good faith provides an additional ground for dismissal, for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

III.

WRONGFUL TAKING

The plaintiff's contention that his property was taken without just compensation alleges the deprivation of a constitutional right, and thus is a basis for federal jurisdiction under 28 U.S.C. § 1343(3). *Lynch v. Household Fin. Corp.*, 40 U.S.L.W. 4335 (U.S. Mar. 23, 1972).

The court is of the opinion, however, that since the plaintiff merely seeks damages for interference with the use of his property, he does not contend that a taking has occurred within the meaning of the fifth and fourteenth amendments to the United States Constitution.[2] Hence, the complaint must be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

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[2] The court assumes that the protection provided by the fifth amendment against the taking of property without just compensation applies to actions by state officials, through the due process clause of the fourteenth amendment, which provides:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

See *Haczela v. City of Bridgeport*, 299 F. Supp. 712 (D. Conn. 1969); cf. *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964).

Not every interference with the use of property constitutes a taking within the meaning of the fifth amendment:

> "Where the line of demarcation between acts which amount to the taking of an interest in property short of a transfer of title, as distinguished from acts resulting only in tortious interference with a plaintiff's rights in his property, is drawn in a case such as is presented here, requires a determination of whether
>
> > 'the action of the Government has been such as to impose a servitude upon the property which interferes with the use, management, or enjoyment of the same. United States v. Lynah, 188 U.S. 445, 23 S. Ct. 349, 47 L.Ed. 539; Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329, 43 S. Ct. 135, 67 L.Ed. 287; United States v. Causby, 328 U.S. 256, 66 S. Ct. 896, 90 L.Ed. 1004; United States v. Virginia Electric & Power Co., 365 U.S. 624, 81 S. Ct. 784, 5 L.Ed.2d 838.' Foster v. Herley, 330 F.2d 87, 90 (6th Cir. 1964).
>
> "The conceptual difference between acts of interference with the use and enjoyment of a person's property by public officials which results only in a claim for damages, and those continuing acts which under all the circumstances ripen into a taking by the government of an interest in the property was discussed in Foster v. Herley, supra. A medley of continuing official acts may develop into so much interference with the owner's use and enjoyment of his property as to justify a finding that it was taken in advance of the formal transfer of title." *Jimmie's, Inc. v. West Haven*, Civ. No. 13,503 (D.

Conn. Mar. 16, 1970), *aff'd.* 436 F.2d 1339 (2d Cir. 1971).

The plaintiff in his prayer for relief seeks an injunction against further attempts by the defendants to take his property "until such time as appropriate constitutional standards are established governing the taking of land for airport purposes," damages for the deprivation of use of his land, and an injunction against the use of the runway lights which allegedly have been erected on his land "unless adequate compensation is paid to the plaintiff for the right to maintain said lights. . . . "

The plaintiff's prayer for relief is inconsistent with the theory that there has been a constructive taking by the state; indeed, he fervently resists the implication that he recognizes any "servitude" imposed on his property by the defendants. He does not want any interest in his property to be taken.

Although the plaintiff conceivably could have argued that the erection of runway lights on his property resulted in a taking of that portion of his property on which the lights are situated, so that upon payment of compensation, title to that portion of his land would vest in the state, he has not chosen to do so. Rather, he seeks to have the use of the lights enjoined "unless adequate compensation is paid to the plaintiff for the *right to maintain said lights*. . . . " (Emphasis added). This theory of the case does not comport with a federal claim, since no taking in the constitutional sense is alleged. *Jimmie's, Inc. v. West Haven, supra. Contra, Inmobiliaria Borinquen, Inc. v. Garcia Santiago,* 295 F. Supp. 203 (D. P.R. 1969). It is quite

obvious that throughout this vigorously contested litigation in the state courts the defendants have continuously, although seemingly ineptly, made repeated attempts to pay the plaintiff "adequate compensation." It is equally clear that the plaintiff has continuously resisted those attempts and refused to accept "adequate compensation." What has resulted from the failure of the defnedants [sic] to employ the correct procedures to effect a taking of the plaintiff's property is a trespass on his land. It would be paradoxical to now treat the case in this court as a condemnation case. The plaintiff's claim gives rise to an ordinary action in tort for the recovery of damages, not a constitutional claim for "adequate compensation" for a taking under the power of eminent domain.

Nor is federal jurisdiction provided by the plaintiff's claim that he was deprived of his property without due process of law, in violation of the fourteenth amendment to the United States Constitution. The record of success which the plaintiff has achieved in the state courts, by his vigorous efforts to resist the taking of his land by the state officials, shows clearly that he has been afforded adequate due process of law.

In the context of this case, it is also clear that the dispute concerning the concrete blocks, which the plaintiff alleges were removed from his land by agents of the defendants and taken to airport property, is more properly viewed as a question of who holds title to this property, rather than a question of whether property has been taken without just compensation. In this posture, there is no federal claim with respect to the concrete blocks.

The plaintiff's one remaining claim is that:

> "The alleged standards and criteria applied to justify condemnation of the plaintiff's land were not uniformly applied to other abuttors, including the abutting land owned by the State of Connecticut, and thus the plaintiff was denied the equal protection of the laws in violation of the FOURTEENTH AMENDMENT to the United States Constitution."

Plaintiff here attacks the "sound exercise of discretionary authority," *Barr v. Mateo*, 360 U.S. 564, 575 (1959), of the state officials, in their decision to attempt to take his land rather than another's. Sovereign immunity bars such an attack. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra.*

The defendants' motion to dismiss is granted, on the ground that the plaintiff has failed to state a claim upon which relief may be granted.

SO ORDERED.

Dated at Hartford, Connecticut, this 3rd day of April, 1972.

M. Joseph Blumenfeld
Chief Judge

APPENDIX Q

SIMMONS v. WETHERELL
Cite as 472 F.2d 509 (1973)

AUGUSTUS J. SIMMONS,

Plaintiff-Appellant,

v.

HORACE B. WETHERELL, as the Director of Aeronautics, et al.,

Defendants-Appellees.

No. 130, Docket 72-1541.

United States Court of Appeals,
Second Circuit.

Argued Dec. 7, 1972.
Decided Jan. 19, 1973.

Landowner brought civil rights action against state authorities alleging that his property had been taken without due compensation. The United States District Court for the District of Connecticut, M. Joseph Blumenfeld, Chief Judge, dismissed, and the landowner appealed. The Court of Appeals, Smith, Circuit Judge, held that where state authorities had proceeded with reasonable speed in their attempts to condemn landowner's efforts at defeating condemnation in state courts, the attempts at condemnation constituted, at most, tortious interference with landowner's property rights and landowner could not maintain a civil rights action arising from the condemnation proceedings, but that landowner's allegations that state had fenced off and put

airport runway lights on portion of property owned by landowner without paying him due compensation or instituting court proceedings stated cause of action for deprivation of landowner's right to enjoy the use of his land; however, resolution of that portion of his complaint would be stayed pending action in state court involving the matter.

Affirmed in part and remanded in part.

1. CIVIL RIGHTS at 13.4(1)

Attempts by state authorities to condemn landowner's property constituted, at most, tortious interference with landowner's property rights and, therefore, landowner could not maintain action against state authorities under statute pertaining to the deprivation of rights secured by the Constitution, where state officials had proceeded with reasonable speed in their attempts to condemn land and any delay arose largely from landowner's efforts at defeating the condemnation in the courts. C.G.S.A. §§ 15-79, 48-12; 28 U.S.C.A. § 1343(3); 42 U.S.C.A. § 1983.

2. COURTS at 303(2)

Appropriate forum for assertion of landowner's tort claim against state authorities based upon effects of apparent ineptitude in condemning landowner's property was in state court. C.G.S.A. §§ 15-79, 48-12; 28 U.S.C.A. § 1343(3); 42 U.S.C.A. § 1983.

3. CIVIL RIGHTS at 13.4(1)

Actions of state authorities in attempting to condemn landowner's property did not constitute a "taking" within ambit of statute pertaining to the deprivation of rights secured by the Constitution. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

4. ACTION at 69(5)
CIVIL RIGHTS at 13.12(3)

Landowner's allegations that state had fenced off land owned by him and had put airport runway lights on it without paying him due compensation or instituting court proceedings were sufficient to state civil rights claim for deprivation of landowner's right to enjoy the use of his land; however, where landowner's claim against state authorities revolved around boundary dispute forming basis of landowner's pending suit in state court, landowner's civil rights action would be stayed pending resolution of the state court action in interest of comity and efficient judicial administration. 42 U.S.C.A. § 1983.

Stephen W. Silverman, Springfield, Mass., for appellant.

S. Victor Feingold, Asst. Atty. Gen. (Robert K. Killian, Atty. Gen. of the State of Connecticut, Clement J. Kichuk, Asst. Atty. Gen., of counsel), for appellees.

Before LUMBARD, SMITH and MANSFIELD, Circuit Judges.

SMITH, Circuit Judge:

This case represents the federal stage of a long-standing and acrimonious court battle between the Simmons family of East Granby, Connectcut [sic] and state officials over the latters' attempts to condemn some land adjoining Bradley International Airport. Augustus J. Simmons now appeals from a judgment of the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, Chief Judge, dismissing his § 1983 action against the named state officials for failure to state a claim upon which relief can be granted. We affirm the bulk of Judge Blumenfeld's decision; however, as to one aspect of this suit, we remand, for the reasons outlined below.

The battle here began when the state aeronautics commission moved under Conn. Gen. Stat. § 15-79, which then governed taking of land for airports,[1] to condemn the Simmons property. Pursuant to the statute, a petition for the determination of compensation was brought by the state in Hartford Superior Court; a judgment was rendered finding the taking reasonable and appointing a referee to assess damages. Anastasia Simmons (appellant's mother), appealed to the Connecticut Supreme Court, which reversed, finding error in the trial court's exclusion of evidence offered to show that property similarly situated had not been taken. State v. Simmons, 153 Conn. 351, 216 A.2d 632 (1966). Since this evidence was

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[1] § 15-79 was repealed by Public Act 768, § 263 (1969).

held to be relevant on the issue of whether the state had acted arbitrarily in singling out the Simmons land, the case was remanded for a new trial.

While the first suit was pending, Mrs. Simmons died, and Augustus entered the fray.[2] Before the second trial began, he raised as an affirmative defense to the taking the fact that the state authorities had not received the requisite statutory approval from the Town of East Granby before proceeding with the condemnation. The trial court agreed; the Supreme Court affirmed. State v. Simmons, 155 Conn. 502, 234 A.2d 835 (1967). Round two for the Simmons family.

Undaunted, the state tried again, this time attempting to use Conn. Gen. Stat. § 48-12, the general condemnation statute, which provided for procedures different from § 15-79 in cases where compensation could not be agreed upon by the parties. The Simmons family prevailed again, in Simmons v. State, 160 Conn. 492, 280 A.2d 351 (1971), when the Supreme Court held that the state was required to use the § 15-79 procedure.

At about the same time the abortive condemnation attempts were taking place, a related dispute arose between the state and Simmons over some land upon which runway lights had been placed. Simmons claimed that the land was his; the state said that it was the state's. An ejectment action followed. In Simmons v. Parizek, 158 Conn. 304, 259 A.2d 642 (1969), the Supreme Court held

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[2] Even Augustus' succession to the land did not escape the scrutiny of the Connecticut courts. *See* Simmons v. McKone, 158 Conn. 71, 255 a.2d 822 (1969).

that since the complaint did not allege that the state officials had acted unconstitutionally or in a manner unauthorized by statute, the suit was barred by the doctrine of sovereign immunity. Appellant took the hint, and on October 14, 1969 resurrected the ejectment action, this time alleging that the taking of the land and the erection of runway lights was done both unconstitutionally and without statutory authorization. That suit, Docket No. 162923, Hartford Superior Court, is still pending.

Shortly before the Connecticut Supreme Court decision in Simmons v. Parizek, *supra*, a Special Act was passed by the Connecticut General Assembly, allowing Augustus Simmons to sue the state for damages over "loss of use of land," arising out of the bumbling condemnation proceedings. On January 5, 1970, Simmons brought such a suit, Docket No. 163875, Hartford Superior Court; the action is still pending.

Thus, if there ever was a litigant who knew that his claims would be fairly heard in the state courts, Augustus Simmons was he. Nevertheless, perhaps for a change of setting, he instituted this § 1983 action on December 22, 1971, alleging that his property was taken without due compensation, and seeking damages. Since the complaint alleged deprivation of property rights through the state action, jurisdiction was correctly predicated upon 28 U.S.C. § 1343(3). Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972).

[1] As Judge Blumenfeld recognized, the basic question presented by this suit is whether the attempts at condemnation amount to an unconstitutional taking, or

whether they simply constitute at most tortious interference by the state officials with Simmons' property rights. Judge Blumenfeld found that the latter situation was presented by the attempts at condemnation here; we agree.

Simmons relies heavily upon such cases as Foster v. Detroit, 405 F.2d 138 (6th Cir. 1968); Foster v. Herley, 330 F.2d 87 (6th Cir. 1964); and Inmobiliaria Borinquen, Inc. v. Santiago, 295 F. Supp. 203 (D. P.R. 1969), for the proposition that government misuse of the condemnation power can support a § 1983 action. While we have no quarrel with the general proposition, this case is readily distinguishable from the ones cited. In each of those instances, the state officials had begun condemnation proceedings and then let them pend, or had announced redevelopment plans and never brought them to fruition. The result was the "freezing" of the plaintiff's use of his property, and the courts found enough of a taking to state a cause of action under § 1983.

Here, however, the state officials proceeded with reasonable speed, if not efficiency, every time they sought to condemn the land. Each effort at condemnation was accompanied by a prompt resort to the judicial process to perfect the taking; each time, Simmons fought the action, and eventually prevailed. In the cited cases, the damage arose from the state's inexcusable delay in finalizing its eminent domain planning; here any delay arises largely from Simmons' efforts at defeating the condemnation in the courts. In the cited cases, the crux of the problem was official inaction; here, the state has repeatedly tried to condemn the land and pay Simmons just compensation. While Simmons certainly should not be censured for

asserting his rights, neither should state officials be forced to await the natural delays of litigation at their peril, particularly when the issues involved are narrow ones of statutory construction.

[2, 3] This is not to say that Simmons may not have a valid tort claim based upon the effects of the state's apparent ineptitude here. But the appropriate forum for the assertion of such a claim is the state court, where Simmons now has an action, brought pursuant to the waiver of immunity in the 1969 Special Act, pending. Whatever else the state's actions here amounted to, they did not constitute a taking within the ambit of § 1983. *See* Jimmie's, Inc. v. City of West Haven, 436 F.2d 1339 (2d Cir.), cert. denied, 403 U.S. 931, 91 S. Ct. 2254, 29 l.Ed.2d 710 (1971).

[4] Thus, as to the condemnation attempts, we affirm the judgment below. The allegations about the land upon which the runway lights are placed, however, stand on a somewhat different footing. At least at this stage of the proceedings, we must accept Simmons' claim that he owns the land, and that the state had fenced it off and put runway lights on it. Assuming all that to be true, we are unable to conclude that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957). If the land is in fact Simmons', and the state indeed has fenced it off without paying him due compensation or instituting court proceedings, it would seem that a deprivation of appellant's right to "enjoy" the use of his land is stated. *See Lynch, supra*, 405 U.S. at 544, S. Ct. 1113.

However, as Judge Blumenfeld properly recognized, the taking claim here really revolves around a boundary dispute. It is that same dispute that forms the basis of Simmons' pending suit, Docket No. 162923, in Hartford Superior Court. The resolution of boundary disputes is a matter traditionally within the purview of the state courts; the final decision there will undoubtedly control Simmons' claims here. Thus, while we find a cause of action stated with respect to the land upon which runway lights are placed, and remand, the district court should stay its hand here pending the resolution of the state court action, both in the interests of comity and efficient judicial administration. *See* Klein v. Walston & Co., 432 F.2d 936 (2d Cir. 1970); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949) (L. Jan, J.)

We have considered appellant's other claims including those based upon an alleged false arrest and imprisonment, and find them without merit. We affirm the judgment below in part and remand in part for disposition not inconsistent with this opinion.

APPENDIX R

Federal Register **Presidential Documents**

Vol. 50. No. 43

Tuesday,
March 5, 1985

Title 3 –

The President

Memorandum of February 27, 1985

Memorandum for the Heads of Executive Departments and Agencies.

The purpose of this Memorandum is to improve administration and implementation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

Specifically, I hereby direct the following actions:

1. The President Memorandum of September 6, 1973 on this subject is superseded.

2. As with other Administration management improvement initiatives, a lead agency, the Department of Transportation (DOT), is designated to coordinate and monitor implementation of the Act, and consult periodically with State and local governments and other organizations and interest groups affected by administration of the Act.

3. DOT, jointly with the Department of Housing and Urban Development, shall interact with the principal executive departments and agencies affected by the Act in developing Administration policy.

4. Within 90 days of the date of this Memorandum, all affected executive departments and agencies shall propose common regulations under the Act. Within one year of the date of this Memorandum, such departments and agencies shall issue common regulations under the Act. Such regulations shall be consistent with the model policy promulgated by DOT, in consultation and coordination with other affected agencies, and published in final form in the **Federal Register** simultaneously with this Memorandum.

5. DOT shall report annually to the President's Council on Management Improvement, through the Office of Management and Budget, on implementation of the Act.

/s/ Ronald Reagan

THE WHITE HOUSE,
Washington, February 27, 1985

[FR Doc. 85-5298
Filed 2-28-85; 4:14 pm]
Billing code 3195-01-M

APPENDIX S

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

NEW ENGLAND REGION
12 NEW ENGLAND EXECUTIVE PARK
BURLINGTON, MA 01803

Lease No.: DOT-FA74NE-0369
BRADLEY INTERNATIONAL
ILS-ALS R/W6

LEASE

between
STATE OF CONNECTICUT
DEPARTMENT OF TRANSPORTATION

and

THE UNITED STATES OF AMERICA

This LEASE, made and entered into this first day of June in the year one thousand nine hundred and seventy four by and between the State of Connecticut, Department of Transportation whose address is 24 Wolcott Hill, Wethersfield, Connecticut, 06109 for itself and its heirs, executors, administrators, successors, and assigns, hereinafter called the lessor, and the UNITED STATES OF AMERICA, hereinafter called the Government:

WITNESSETH: The parties hereto for the consideration hereinafter mentioned covenant and agree as follows:

1. For the term beginning June 1, 1974 and ending June 30, 1974, the lessor hereby leases to the Government the following described property, hereinafter called the premises, viz:

As contained in Exhibit I attached hereto and made a part hereof.

* * *

9. The Lessor grants to the Government the right to utilize any existing power lines, control lines, conduits, or other facilities of the Lessor which are adaptable to use in connection with the purpose of this covenant.

10. The Lessor hereby warrants that it has acquired and possesses an adequate real estate right in the property described herein, and that it is authorized to grant to the Government the rights and interests set forth herein.

11. The right of ingress and egress and the right of way herein granted shall insure to the benefits of the Government and its duly authorized agents, representative, contractors and employees.

12. The Lessor agrees not to erect or to allow to be erected on the property leased hereby or on adjacent property of the Lessor, any structure or obstruction of whatsoever kind of nature as will interfere with the proper operation of the facilities to be installed by the Government under the terms of this Lease unless consent thereto shall first be secured from the Government in writing. Further, in order to insure the continuing proper operation of the ALS Facility, the Lessor shall prevent the erection of any structure, or the natural growth of trees, brush that will cause that structure or natural growth to:

(a) protrude an area hereinafter referred to as the light plane. For obstruction clearance purposes this light plane is defined as rectangular in shape, 400 feet wide and symmetrically located about the ALS centerline;

it shall start at the landing threshold and extend 200 feet beyond the approach end of the system.

(b) prevent a clear line of sight to all lights of the system from any point on a surface, one-half degree below the glide path and extending 250 feet each side of the centerline, up to 1600 feet in advance of the outermost light in the system.

13. In order to insure the continuing proper operation of the Instrument Landing System(s), the Lessor agrees that certain critical and no-parking areas, which are shown on the attached Drawing No. 1-A-3076, shall be established in the vicinity of the localizer and glide slope facilities.

Where the critical areas lie within the bounds of the Airport, the Lessor agrees not to erect or allow to be erected any structure of any kind or nature nor to perform or allow to be performed any excavating, grading or planting operations within these areas, without the prior concurrence of the government. Where the critical areas lie outside the bounds of the Airport, the Lessor agrees to extend every effort to negotiate agreements with the property owners involved covering these restrictions.

In the event of natural erosion, the Lessor agrees to perform corrective grading, planting and excavation within the critical area. Such work shall be accomplished during a period which is mutually agreeable to both Lessor and Lessee.

Where the critical and no-parking areas lie within the bounds of the Airport, the Lessor agrees not to permit the presence of parked aircraft, vehicles or equipment within

the critical and no-parking areas, or of free moving aircraft or vehicles within the critical areas which are not under the control of tower personnel when the facilities are in operation. The Lessor agrees to provide and maintain no-parking signs within these areas, when required.

Where the critical and no-parking areas lie outside the bounds of the Airport, the Lessor agrees to extend every effort to negotiate agreements with the property owners involved granting the Lessor the right to establish and maintain no-parking signs on their properties within these areas.

The Lessor further agrees to provide and maintain markings as required, on all paved areas to delineate the limits of the critical area.

14. The Government waives the requirement for radio control of traffic in the vicinity of Runway 6 Localizer on the North Perimeter Road.

15. For and in consideration of the benefit to the Bradley International Airport and the general public using same, the Lessor agrees to and grants to the government all terms and conditions stated herein at no cost.

16. This lease will supersede License DOT-FA73NE-0308 on commissioning of the CAT-II ILS system.

17. The Lessor further agrees that in the event that relocation or modification of the FAA's facilities associated with air navigation or components thereof hereinbefore described is made necessary by airport improvements or changes made or caused to be made by the airport owner (the term "airport owner" used herein refers to the political subdivision or other competent

authority responsible for the airport operation and capital improvements), the costs of such relocation or modification shall be chargeable to the Lessor; that the Government shall have the exclusive right to determine how the relocation or modification project shall be accomplished including, but not limited to, the engineering, site selection, procurement of equipment; construction, installation, testing, flight inspection and recommissioning of the facility; that upon submission by the Government of an estimate of the relocation or modification costs, the Lessor shall transfer to the Government the funds required for the relocation or modification; that in the event the actual costs of relocation or modification exceed the estimate submitted by the Government the Lessor shall pay only the actual costs; that the Government shall have the exclusive right to determine when a relocation or modification of a facility or component thereof has been made necessary by airport improvements or changes made or caused to be made by the airport owner, and that this decision shall be final. It is agreed by and between the Lessor and the Government that in the event the actual costs of relocation or modification of a facility or component thereof is less that the estimate submitted by the Government the Lessor shall pay only the actual costs.

18. The following changes were made to this Lease prior to execution:

a. Deletion of certain wording in paragraph 2.

b. Deletion of paragraph 3 in its entirety.

c. Addition of certain wording in paragraph 7.

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their names as of the date indicated.

WITNESSES

/s/ Sandra L. Barone

/s/ Madeline P. Makiaria

/s/ George J. Bates

/s/ Susan R. Pitt

STATE OF CONNECTICUT
DEPARTMENT OF
TRANSPORTATION

By /s/ Joseph B. Burns
(Seal)
Joseph B. Burns
Commissioner

Date: June 11, 1974

UNITED STATE [sic]
OF AMERICA
DEPARTMENT OF
TRANSPORTATION

By /s/ Roland O. Bisson Jr
(Seal)

Date: May 24, 1974

This Agreement is made with the approval of the undersigned, under the provisions of Section 13b-42(b) of the General Statutes of Connecticut, as revised.

/s/ C. Pierre Phillips
Deputy Attorney
General
State of Connecticut

Date: JUL 26 1974

/s/ Gerald J. Nelson
Deputy Commissioner
of Finance and
Control
State of Connecticut

Date: 6/25/74